Supreme Court, U.S.
FILED
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92-88

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

VICTOR H. GOULDING,

Petitioner,

v.

UNITED STATES OF AMERICA,
(COMMISSIONER OF INTERNAL REVENUE),

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether due process requires the Internal Revenue Service to take reasonable measures to assure that the "notice of deficiency" provides actual "notice of the deficiency"? When the certified mailing of the notice of deficiency is returned to the Internal Revenue Service unclaimed (particularly where the taxpayer is out of town at the time) does due process require that the Internal Revenue Service expend 25¢ to resend the notice of deficiency to the taxpayer by regular mail?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding include Victor H. Goulding, Plaintiff, who is pursuing his refund claim against the United States of America, Commissioner of Internal Revenue, as Respondent.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Victor H. Goulding (Goulding) prays a writ of certiorari to issue to review the opinion of the Seventh Circuit Court of Appeals, which affirmed the District Court's denial of the Taxpayer's Motion for Summary Judgment, premised upon the Due Process clause of the Fifth Amendment.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The Opinions delivered in this case are as follows:

1. The April 8, 1991 decision of the United States Court of Appeals for the Seventh Circuit, appended hereto as Appendix A.

2. The June 5, 1991 denial of Petitioner's Petition for Rehearing, appended hereto as Appendix B.

3. The November 29, 1989 United States District Court Opinion rendered by Judge Milton I. Shadur, appended hereto as Appendix C.

JURISDICTION

On June 5, 1991, the United States Court of Appeals for the Seventh Circuit denied Goulding's *Petition for Rehearing* (Appendix B). The Opinion of the Seventh Circuit was entered on April 8, 1991 (Appendix A). Review of this judgment is sought pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

. . . No person shall be . . . deprived of . . . liberty, or property, without due process of law.

STATEMENT OF THE CASE
(Material Facts)

On June 18, 1987, Petitioner Victor H. Goulding (hereinafter "Goulding") paid a certain undefined and unexplained federal income tax bill of $45,919.72, allegedly arising out of an alleged deficiency from 1982. Thereafter, on July

7, 1987, Goulding filed a Claim for Refund. Being unaware of the basis for the Respondent Internal Revenue Service's (hereinafter "Respondent") assessment, the Claim was rather general. These amounts are from a notice of deficiency allegedly issued by Respondent on July 26, 1986, but never received by Goulding. On or about November 19, 1987, Respondent denied the Claim, "Per Audit Determination."

On January 12, 1988, and within the two-year statutory period of limitations, Goulding filed the instant Complaint. On July 6, 1988, Respondent answered the Complaint. Respondent filed no affirmative defenses and filed no counterclaim.

A. ***Circumstances attending "notice"***

On July 26, 1986, and for approximately two weeks thereafter (and nearly one year prior to Goulding's receipt of the tax bill in question), Goulding was out of town and unable to secure from the post office a certified mailing, which may have been sent by Respondent and which may have been a notice of deficiency. The certified mailing was thereafter returned to the sender (IRS). Even if Respondent did attempt to send such notice of deficiency relative to Goulding's 1982 Federal Income Tax Return, Respondent made no attempt to resend same by regular mail or to otherwise contact Goulding as to such "notice" once it was returned unclaimed. Nor did Respondent attempt to send the notice to Goulding's business address.

The examining Internal Revenue Agents, Irving Feinglass and Thomas Dietz, had been in Goulding's offices on numerous occasions during the examination of the partnership to which the assessment relates and even subsequent to the examination. These agents were well aware

of the fact that Goulding was frequently out of town and in a semi-retired state due to his advanced age—then 72 years old. Also, most Internal Revenue Service filings by Goulding reflected the then office address, 77 West Washington as his mailing address, not his residence of 300 North State Street. Additionally, all Goulding's filings and mailings to Goulding bear a return address of 77 West Washington Street. It is true that most filings also bear Goulding's residence of 300 N. State where the notice of deficiency was allegedly sent. However, such Internal Revenue forms ask for the taxpayer's residence, not the notice address.

B. ***Background***

After paying the taxes, Goulding filed an admittedly general claim for refund, not knowing the basis for the Internal Revenue Service assessment. Goulding indicated in the claim that: (1) no amount was due and that (2) Respondent's assessment was illegal, being without notice. More Goulding could not state.

The Internal Revenue Service responded to taxpayer's Claim for Refund by denying the claim, not based upon or otherwise asserting any perceived or expressed deficiency in the form or content of the Claim for Refund, but, instead, "Per Audit Determination." The Internal Revenue Service made no request of the taxpayer to supply any missing evidence or missing information as to the basis for the Claim for Refund. Such Internal Revenue Service claim denial "Per Audit Determination" was covered in a report the subject matter of which was covered in the notice of deficiency. After suit was filed, pursuant to Goulding's discovery request, Respondent furnished Goulding with a copy of the notice of deficiency purported-

ly issued by Respondent, which notice of deficiency forms the basis of Respondent's analysis and of the instant dispute.

Upon Brief, Respondent conceded that it was incorrect in its premise upon which it sought and secured summary judgment. Specifically, Respondent conceded that Judge Shadur was incorrect in granting Respondent summary judgment since its actions had waived any defect in the Claim for Refund and further waived any variance in the Claim for Refund. Thus, Respondent seeks a remand of this case. Goulding agrees that Judge Shadur was incorrect on the variance question and on the question as to any deficiency in the Claim for Refund. However, Goulding further asserts that Judge Shadur was incorrect in his denial of Goulding's motion for summary judgment.

However, now before this Court, is the denial of Goulding's motion for summary judgment premised on the question as to the reasonableness of the Government's conduct with regard to the notice of deficiency. We query—does Respondent's obligation end with the certified mailing or does due process require, if the certified mailing is returned unclaimed, that certain additional measures be taken involving minimal cost and minimal burden to the Government?

STATEMENT OF THE FEDERAL JURISDICTION OF COURTS BELOW

Goulding initiated this case in the United States District Court, after Respondent denied Goulding's claim for refund, seeking the refund of $45,919.72 of wrongfully collected Federal Income Taxes as follows:

Year	Deficiency	§6651 Addition to Tax	Interest
1982	$25,891	$1,553.46	$18,475.26

The District Court had jurisdiction pursuant to 28 U.S.C. Section 1346(a)(1) and 26 U.S.C. Section 7442. The decision (Appendix C) of the District Court (Judge Shadur), was entered on November 29, 1989, granting the motion for summary judgment filed by Respondent and denying Taxpayer's motion for summary judgment. Notice of Appeal was timely filed on December 29, 1989. Jurisdiction was conferred upon the United States Court of Appeals for the Seventh Circuit by 28 U.S.C. Section 1291.

REASONS FOR GRANTING THE WRIT

There is a substantial conflict among the Circuits as to what, at a minimum, the Due Process Clause of the Fifth Amendment imposes upon Respondent in providing notice of the deficiency. Additionally, however, the Seventh Circuit's Opinion imposes a serious threat to the viability of the Due Process Clause. Due to the extreme importance of the notice of deficiency and the severe repercussions visiting the millions of taxpayers who fail to receive a notice of deficiency, Due Process requires that the IRS, upon its receipt of a returned certified mailing of the notice of deficiency, must, at the very least, expend the twenty-five cents (now twenty-nine cents) to resend such notice by regular mail.

ARGUMENT

Due process requires that the notice of deficiency should be reasonably calculated to provide notice of the deficiency. If mailed at all, the notice of deficiency was not properly mailed to Goulding, not sent to the address known to Respondent the most likely to reach Goulding. Nor did Respondent bother to resend it, by regular mail or otherwise, when it was returned unclaimed. The "notice" was therefore not "notice" of anything and was thus fatally defective.

While it is clear that the Internal Revenue Service conformed its "notice" to the minimal requirements of 26 U.S.C. §6212, it fails to meet the test of due process. The importance of this notice cannot be disputed. If one fails to receive the notice, his rights to dispute the deficiency are predicated upon his financial ability to pay the deficiency and to then pursue his rights in either United States District Court or United States Claims Court.

Once the notice was returned to the government, unclaimed, it would have cost the government only *$.25 to send it by regular mail to assure its receipt*! **In balancing the severity of the circumstances visiting the taxpayer who fails to receive such notice with the $.25 cost upon the government to assure receipt, it is difficult to understand why this Court would not impose such a minimal burden ($.25) when such significant and severe circumstances attend one's non-receipt.**

The Due Process clause of the United States Constitution is worth at least $.25!

Due to the importance of the notice of deficiency and the fact that United States Tax Court jurisdiction is predicated upon a timely (within 90 days) taxpayer response

to the notice of deficiency, the notice should be reasonably calculated to provide actual notice of the deficiency. While the case law is extremely liberal with Respondent and imposes a minimal burden upon the Government, the Taxpayer feels that such position should be reconsidered to impose at least a burden of sending the notice by regular mail.

Significantly, if a taxpayer is unable to pay the amount of the Government's determined deficiency, his only opportunity to dispute such a determination is in United States Tax Court. While the instant taxpayer was fortunate enough to have the wherewithal to pay such deficiency, other taxpayers may not be so fortunate. Accordingly, for many citizens, United States Tax Court is the only available forum for resolving a tax dispute. A citizen's right to litigate a tax dispute should not depend upon whether the citizen was out of town when the Internal Revenue Service fortuitously decided to mail the notice of deficiency.

Without being reasonably calculated to furnish actual notice, it is not appropriate "notice" of anything and therefore should not be accorded any legal effect. In particular, the Government in the instant case should have made some effort to provide notice other than blind adherence to the minimal statutory requirement of mailing by certified mail. When the notice of deficiency was returned to Respondent (unclaimed since Mr. Goulding was out of town), Respondent made no attempt to send same by regular mail or to otherwise contact Goulding as to such "notice." Nor did Respondent attempt to send the notice to Goulding's business address.

The purpose of the notice of deficiency is, as its name suggests, to furnish the taxpayer with "notice" of the

Commissioner's determination of a deficiency. Actual notice could have been accomplished, had Respondent so desired, by either sending the notice (in addition to the certified mailing that Respondent allegedly performed) by regular mail to his home address or by either certified or regular mail to his business address (77 West Washington Street, Chicago, Illinois) which address was known to Respondent. Due to the importance of the property rights involved and the severity of the circumstances, we feel that due process imposes such a minimal burden (mailing by regular mail to a taxpayer's home or business address) upon the Internal Revenue Service.

Interestingly, Respondent sent the tax bill to taxpayer (approximately nine months later) by regular mail. Apparently, the Internal Revenue Service felt that such method was reasonable to afford the taxpayer with notice of the amount due but not to afford the taxpayer with notice of the deficiency. Perhaps if the Internal Revenue Service was more interested in taxpayer's rights and notions of due process and less interested in collection, this Honorable Court would not be burdened with this controversy and the Internal Revenue Service would not enjoy such "low repute." See *R. Richman*, 447 F. Supp. 929, 932 (1978).

Clearly, Respondent failed to make a reasonable effort and failed to take reasonable measures to provide Goulding with notice. Therefore, the notice was not properly addressed and was therefore invalid in accordance with *O'Brien*, 62 TC 543 (1974), Acq.; *DiViaio v. Commissioner*, 532 F.2d 231 (1976, Dist. of Col.); *Est. of McKeig, Jr.*, 51 TC 331 (1968); *Heaberlin*, 34 TC 58 (1960). If the Internal Revenue Service becomes aware of a new address through an oral communication, the *Internal Revenue Service is charged with that notice and is therefore*

required to abide by such information and send the notice of deficiency to such other address. *DeWelles v. United States*, 378 F.2d 37, *cert. den.* 389 U.S. 966 (1968). See also *Riddell* D.C. Calif., 10/21/52; *Wood v. IRS*, D.C. Idaho, 12/8/78; *Maxfield v. Commissioner*, 153 F.2d 325 (CA9, 1946); *Welch v. Schweitzer*, 106 F.2d 885 (CA9, 1939); *Barrack v. United States*, D.C. Mo., 10/11/56; *Kennedy v. United States*, 403 F. Supp. 619, *affd.* CA6, 4/27/77, where the Internal Revenue Service was determined to have failed to make a *reasonable effort* to provide notice of deficiency when it merely mailed the notice to *a known address.*

In short, not only could Respondent have improved its chances of accomplishing the statutory goal of notice by also sending the "notice" of deficiency by regular mail, but the Internal Revenue Service knew of the proper address and knew of the best manner in which to provide taxpayer with notice. Nonetheless, **Respondent failed and refused to take reasonable measures, involving minimal burden, to provide notice of the deficiency.**

Due process demands more (at least 25 cents more) before the Government should be entitled to deprive a citizen of property!

CONCLUSION

The instant "notice" of deficiency should be held invalid as not being reasonably calculated to apprise Goulding of such "notice"; Respondent has failed to take reasonable measures to assure actual notice. Respondent could have easily accomplished actual notice, if it so desired, also by

sending the "notice" of deficiency by regular mail and/or sending the notice to Goulding's business address, which was known by Respondent as the address most likely to accomplish actual notice. Clearly, requiring only blind adherence to statutory requirements without requiring reasonable efforts involving a minimal expenditure of time and resources, would needlessly and senselessly exalt such formalities over substantive matters and effectively deny due process to millions of taxpayers.

Where such important rights are involved, due process requires that the Government expend twenty-five cents before being able to take property under such circumstances.

Therefore, it is respectfully requested that the United States Court of Appeals for the Seventh Circuit be reversed and that judgment be entered in Goulding's favor and against Respondent, and for such other and further relief as this Honorable Court deems appropriate in the circumstances.

Respectfully submitted,

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August 30, 1991